FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
202-434-9981/TELE FAX: 202-434-9949

January 2, 2009

CUMBERLAND COAL RESOURCES, LP	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2008-51-R
	:	Citation No. 7025468;10/04/2007
	:	
v.	:	Docket No. PENN 2008-52-R
	:	Order No. 7025469; 10/04/2007
	:	
	:	Docket No. PENN 2008-53-R
	:	Order No. 7025480; 10/22/2007
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 2008-54-R
MINE SAFETY AND HEALTH	:	Order No. 7025481; 10/11/2007
ADMINISTRATION, (MSHA),	:	
Respondent	:	Cumberland Mine
	:	Mine ID 36-05018

DECISION

Appearances: Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Cumberland Coal Resources, LP.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Cumberland Coal Resources, LP, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The notices challenge a citation and three orders issued by the Secretary's Mine Safety and Health Administration. A hearing was held in Pittsburgh, Pennsylvania, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, the citation and orders are affirmed. However, Citation No. 7025468 and Order Nos. 7025469 and 7025480 are modified to citations issued pursuant to section 104(a) of the Act.

Findings of Fact - Conclusions of Law

Cumberland Coal Resources, LP, operates a large underground coal mine, the Cumberland Mine, in Greene County, Pennsylvania. The Cumberland Mine is a "gassy" mine, liberating over one million cubic feet of methane in a 24-hour period, and is subject to 5-day spot

inspections by the Secretary's Mine Safety and Health Administration pursuant to section 103(i) of the Act. On October 4, 2007, MSHA coal mine inspector, Barry Radolec, conducted a regular quarterly inspection of the mine. David Severini, Radolec's supervisor, accompanied him in order to conduct an evaluation of his performance. Tr. 170. Severini's supervisor, assistant district manager Anthony Guley was also present to evaluate Severini's performance. Ronald Duke, a United Mine Workers of America representative, and Michael Konosky, Cumberland's representative, completed the inspection party.

Before starting his inspection, Radolec reviewed the MSHA mine file and, when he arrived at the mine, reviewed the preshift and onshift report books for the 8 Butt section. He noticed entries for several previous days to the effect that areas of the belt entry from crosscuts #25 to #30 and #11 to #15 needed rock dusting. Tr. 66-67; ex. G-5. He traveled to the 8 Butt section, disembarking at the #11 crosscut so that he could walk the belt entry from that point to the working places near crosscuts #33 and #34. The conveyor belt transporting coal away from the section was five to six feet wide and its bottom rollers were 18-24 inches above the mine floor. Tr. 70. He found no hazardous conditions between crosscuts #11 and #15. Tr. 138. At the #17.5 crosscut, he observed that the belt had gone out of alignment. One side of the lower portion of the belt was rubbing on a metal belt stand. The abrasive action of the belt had cut into the steel stand approximately one-quarter to one-half inch. The stand was warm to the touch, and there was blue "smoke" rising about six to eight inches from the belt/stand contact point. Tr. 70-71. There was a small, pyramid-shaped pile of belt shavings, about six inches high near the point where the belt was rubbing the stand. Radolec believed that the belt was on fire and that the blue "smoke" was an indication that rubber was burning.[1] Tr. 71-72. When Duke, the miners' representative, observed the condition, he promptly took the belt out of service so that the misalignment could be corrected. Tr. 75. Radolec then proceeded with the inspection, traveling inby.

Radolec observed accumulations of dry black float coal dust, coal fines and loose coal in the entry between crosscuts #25 and #25.5, #26.5 and 50 feet outby #27, and #27 and #30.5. The coal and fines and loose coal were underneath the belt and ranged 4 inches deep in the center of the 16-foot wide entry and tapered out to one-half inch deep near the ribs. Between crosscuts #28 and #30.5 there were piles six to eight inches deep and 24 inches in diameter. Tr. 77-80, 137. There was a thin layer of float coal dust on the belt structures, electric cables and switches. Tr. 36, 80, 172. The float coal dust was deposited on "token" rock dust, such that, when wiped, it was gray in color. Tr. 49, 83, 160, 164, 172-73. Radolec determined that the condition was highly likely to result in a fire that would cause fatalities because the belt presented several potential ignition sources, including, the misalignment, the possibility of additional misalignments, and the possibility of a failure of a roller bearing resulting in sparking and friction. He also considered the presence of electrical cables, boxes and switches. Tr. 85-86.

---

[1] Radolec issued Citation No. 7025467, alleging a violation of 30 C.F.R. § 75.1725(a), for failure to maintain machinery in a safe condition. Ex. G-2. That citation is not at issue in these proceedings.

He determined that Cumberland's negligence with respect to the violation was high because of the notations "needs dusted" that had been reported on records of preshift examinations from September 25 to October 4. At 9:30 a.m., he issued Citation No. 7025468, pursuant to section 104(d) of the Act, alleging a significant and substantial and unwarrantable failure violation of 30 C.F.R. § 75.400, which requires that combustible materials be cleaned up and not allowed to accumulate, and specified that the violation was to be terminated by 1:40 p.m., that day. Ex. G-4. A crew of eight to ten miners began shoveling the accumulations, worked for about an hour until the inspection party left, and continued thereafter. Tr. 52. Radolec also issued Order No. 7025469, alleging a significant and substantial and unwarrantable failure violation of 30 C.F.R. § 75.363(a), which requires that hazardous conditions found during preshift examinations be corrected immediately or be posted with a conspicuous danger sign. Ex. G-8. He left the mine after completing the inspection.

Radolec returned to the mine on October 9, to determine if the cited conditions had been abated.[2] He inspected the subject area and found that it had been approximately 75% cleaned. Tr. 104. Although a light layer of rock dust had been applied, coal fines were still present in the area of the #29 to #30 crosscuts. Radolec spoke to Fred Evans, a Cumberland safety representative, who instructed two miners to clean the area. Tr. 104-05. Radolec extended the time within which the violation was to be terminated to 2:45 p.m. on October 9, and then left the mine. He returned on October 11 to conduct a 5-day spot inspection for methane. Tr. 106. Accompanied by Walter Lemenovich, an MSHA trainee inspector, John Perry, a Cumberland safety representative, and Mickey Geisel, a miners' representative, he proceeded to the 8 Butt belt entry at the #29 to #30 crosscuts, expecting to terminate the accumulations violation. However, he found the area in the same condition it had been in on October 9. No more work had been done and there had been only token rock dusting. Tr. 107-08. At 10:30 a.m., he terminated the Citation and issued Order No. 7025481, pursuant to section 104(b) of the Act.[3] He told Perry to take the belt out of service, and to have the area cleaned and dusted immediately. Tr. 108-09; ex. G-10, G-7 at 14-15. At around 12:00 noon, Perry advised that the condition had been corrected. However, Radolec refused to terminate the Order until further rock dusting had been done. Tr. 111. The Order was terminated at 1:20 p.m.

On October 11, while en route to check on the area of the accumulations, Radolec inspected the track haulage entry because he had seen notations in the preshift book for at least five shifts to the effect that garbage was located at the #10 and #20 crosscuts. At crosscut #10, he observed wooden pallets, plastic containers, empty oil cans, paper bags and cardboard boxes,

---

[2] October 4, 2007, was a Thursday, and Monday, October 8, was a holiday.

[3] Section 104(b) of the Act provides that, where an inspector determines that a violation cited under section 104(a) "has not been totally abated within the period of time as originally fixed or subsequently extended, and that the period of time for the abatement should not be further extended," he shall issue an order requiring the withdrawal of affected miners from the area. 30 U.S.C. § 814(b).

piled irregularly two to three feet high, half way across the crosscut for half of its length, an area about 8 by 35 feet. Tr. 449-51. At crosscut #20, he observed a large plastic trash bag hanging from the rib, filled with empty oil cans and plastic containers. At 9:45 a.m., he issued Order No. 7025480, pursuant to section 104(d)(1) of the Act, alleging a significant and substantial and unwarrantable failure violation of the combustible accumulations standard, 30 C.F.R. § 75.400. Upon his return to the MSHA field office, the Order was reviewed with Severini, and was modified to allege that an injury was unlikely, that the violation was not S&S and that no persons were affected.

Cumberland timely filed Notices of Contest with respect to the Citation and Orders. The parties have represented that disposition of these Contest Proceedings will facilitate resolution of any remaining issues, e.g., those associated with the determination of appropriate civil penalties, such that no further hearing will be required. The alleged violations are addressed below.

Citation No. 7025468

Citation No. 7025468, issued on October 4, 2007, alleges a violation of 30 C.F.R. § 75.400, which provides:

> § 75.400 Accumulation of combustible materials
>
> Coal dust, including float coal dust deposited on rock dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

The alleged violation was described in the "Condition and Practice" section of the Citation as follows:

> An accumulation of dry black coal float dust and dry black coal fines existed in the conveyor belt entry on the active 8 Butt (027) M.M.U. development mining section of the mine. This accumulation existed starting at the number 25 cross-cut and continued to the number 30 1/2 cross-cut, the location of the conveyor belt tail roller. These accumulations of dry black coal float dust existed on the conveyor belt structure, metal 6-inch pipe line, roof support metal channels, mine roof and ribs, mine floor, electrical power cables, on/off electrical switches, dry black coal fines and plastic mesh installed on the ribs. The accumulations of dry black coal fines measured from 1/2 inches to 4 inches across the width of the 16 foot wide entry and for a distance of 75 feet from number 25 to 25 1/2 cross-cut. Also the same type coal fines existed from 26 1/2 cross-cut to 50 feet out by number 27 cross-cut. Number 27 to number 30 1/2 cross-cut the same type coal fines existed along side and under conveyor and in cross-cuts. Number 28 cross-cut to the tail roller coal piles existed under the bottom conveyor belt bottom

> rollers that measured 6 inches to 8 inches in depth, 24 inches wide and 24 inches long. This type of condition creates a Highly Likely condition for a coal dust explosion and mine fire to occur. This condition has been reported in the pre shift record book since 9/25/2007, 8:00 P.M. to 8:40 P.M. and continued until this days pre-shift examination. This type violation has been issued 63 times in the last 2 years at this mine.

Ex. G-4.

Radolec determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was high. The citation was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard.

The Violation

Radolec and Severini testified about the conditions they observed, as documented in the Citation. Supervisory inspector Severini traveled to the section separately, and met Radolec near the feeder. Radolec informed him of the accumulations that he had found and the belt misalignment. They then walked back outby, from the belt tailpiece to crosscut #28. Severini observed the float coal dust on the roof, ribs and belt structure. Tr. 172-73. He also observed accumulations under the belt, almost rib to rib. Tr. 173. He and Radolec concluded that the conditions may have been the result of an inadequate cleanup in conjunction with the last belt move, and that the material had been dragged up the entry as the belt was extended. He saw "token rock dusting, at best." Tr. 173. He agreed that the area needed to be cleaned and bulk rock dusted.

In his capacity as a supervisory inspector, Severini reviews citations and orders written by inspectors. He agreed with Radolec's determination that the standard had been violated, and with his assessment of gravity, although he did not appear to regard the conditions as seriously as Radolec, stating that the condition "wasn't the worst I've ever seen. But it was unacceptable." Tr. 175. Duke, the miners' representative, assisted Radolec in taking measurements of the depth of the accumulations, and confirmed the existence of the conditions in the entry as described in the Citation. Tr. 36. He testified that after a belt move, the area is usually "fling dusted," but that it hadn't been done as far as he could tell.[4] Tr. 36-37. He believed that the condition was hazardous, primarily because of the float coal dust. Tr. 38. Duke disagreed with Radolec's instruction that material along the ribs and in the crosscuts had to be shoveled. "The stuff that was along the ribs is the draw slate, it flakes off. . . . I felt it wasn't that bad to where it needed

[4] Fling dusting is done with a mechanical distributer mounted on a scoop, and is applied to the cleaned area before the belt tailpiece is moved inby. Bulk rock dusting is done with an air blowing system after a belt move has been completed. Tr. 174, 235, 243.

[to be] shoveled." Tr. 47.

Konosky, a senior safety representative at Cumberland, traveled to the 8 Butt section with Severini and Guly, and met Radolec and Duke at the feeder. When informed that the accumulations citation had been issued, he examined the belt entry in the area of the #25 to #30 crosscuts. While he did not agree that there were dry black coal fines across the width of the entry, he confirmed that there were some spots with some spillage, and explained "that's coal mining." Tr. 223. He testified that the area had been fling dusted when the belt was moved, but did not know if there was float coal dust present, and explained that rock dust is darker when it is wet and could be mistaken for float coal dust. Tr. 221-22.

There is relatively little dispute concerning the existence of the conditions, as described by Radolec, Severini and Duke, each of whom has considerable mining experience. Konosky did not refute their testimony, and his explanation that rock dust, when wet, could be mistaken for float coal dust was unconvincing. Accumulations of loose coal and coal fines, one-half to four inches deep, were present across nearly the entire width of the belt entry in several locations from the #25 to the #30.5 crosscuts. There were irregularly spaced piles of coal from six to eight inches deep between crosscuts #28 and #30.5. In addition, there was a thin layer of float coal dust on stationary horizontal surfaces, deposited on an inadequate layer of rock dust that had been applied by hand. The area had not been fling dusted when the belt moves were done, and bulk rock dusting had not progressed to that area. While some of the material along the ribs and in the crosscuts was non-hazardous draw slate, and some rock dust had been applied in the area, a significant quantity of combustible material had been permitted to accumulate, in violation of the standard.[5]

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the

[5] I also find that a reasonably prudent person, familiar with the mining industry and the protective purposes of the Act, should have realized that the conditions violated the standard.

> violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. The measure of danger to safety was contributed to by the presence of the combustible accumulations, which presented a hazardous condition, i.e., the possibility of a fire or explosion or an exacerbation of the effects of a fire or explosion that might occur in the area. Any injury resulting from such an event could be expected to be reasonably serious. The focus of the S&S analysis, as is often the case, is whether the violation was reasonably likely to result in an injury producing event. Cumberland also makes an argument that, even if there was an ignition and fire, there was no reasonable likelihood of a serious injury resulting. Because I find that the Secretary has failed to carry her burden of proof on the third element of the test, I need not reach Cumberland's argument on the forth element. While it has some appeal, it appears to be foreclosed by Commission precedent.[6]

---

[6] Cumberland's argument is based largely on an MSHA study, reporting that no fatalities or reportable injuries resulted from any of the 63 reportable belt fires that occurred from 1980 through 2005. Coupled with the presence of multiple safety features, some of recent origin, it contends that a potential belt fire cannot be found to be reasonably likely to result in a serious injury. The courts and the Commission have held, however, that such evidence does not

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a 'confluence of factors' was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.,* 12 FMSHCR 965, 970-71 (May 1990) ('*UP&L'*); *Texasgulf*, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Radolec addressed the factors identified in *Enlow Fork* in explaining his determination that the violation was S&S. He described the accumulations, cited the presence of methane, and identified the conveyor belt system and related electrical equipment as potential ignition sources. Tr. 85 He also described a remarkably catastrophic sequence of events that he deemed was highly likely to occur as a result of the violation, beginning with the dust and coal fines igniting, resulting in a fire that would grow to such an extent that it would prevent effective ventilation, producing a buildup of methane which would explode, putting the float coal dust into suspension, resulting in another explosion, such that the entire mine and any miners in it would be caught up in the conflagration. Tr. 82-83, 146-47, 416-20. Radolec's opinion about the likelihood of a catastrophic event, which appears to have little, if anything, to do with the cited accumulations, will be discussed in conjunction with the *Enlow Fork* factors.

The Accumulations

While the accumulations existed over a significant area, they ranged from one-half to four inches deep, and were not close to the belt or bottom rollers. The deposits were not being added to as mining continued.[7] Radolec and Severini concluded that they were the product of loose coal that had been dragged up the entry during the last belt move. Tr. 173. While they existed over areas that could be described as extensive, they were not particularly extensive in volume, and were considerably removed from moving machine parts. There was a thin layer of float coal dust, deposited on previously rock dusted surfaces. However, the rock dusting that had been done was inadequate.

---

establish that a violation is not S&S. *See Buck Creek Coal, supra; Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997). One problem with the argument is that the report did not correlate the incidence of belt fires with the presence of unlawful accumulations. Had unlawful accumulations been present, there may have been more serious consequences.

[7] Radolec confirmed that the deposits had not been added to between October 4 and October 11, and that it was a "pretty good belt." Tr. 133.

Ignition Sources

Radolec identified potential ignition sources as friction from the belt going out of alignment, like he found at crosscut #17.5, and friction and sparks from belt rollers with bad bearings. Tr. 85. He also believed that it was highly likely that the conveyor belt itself would cause the coal dust to ignite, because of its capacity to generate heat. Tr. 83-85. He also mentioned dust on cables and electrical boxes, including belt switches, cables to the carbon monoxide ("CO") monitors, and the power cable for the feeder. However, he did not explain how the cables or the electrical boxes could produce an ignition, or the likelihood that such an event would occur. Tr. 85, 121. It appears that the cables and wires were stationary and insulated, and that the connections were enclosed in boxes. Aside from the power cable that had not been properly hung, he did not identify any defects in any of the electrical equipment. His belief that the cables could be ignition sources was apparently based upon the occurrence of some event that would result in damage and the creation of sparks or heat build-up. But, he did not identify the nature of such an event, or the likelihood of it occurring. The fact that electrical cables or equipment *could* somehow result in an ignition cannot establish that the violation was S&S. *Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur – S&S finding reversed, in part, because ALJ did not consider that electrical cables in area were insulated and produced no heat).

Radolec considered the misalignment of the belt at crosscut # 17.5 as a potential ignition source. Tr. 84-85. However, his explanation of how the misalignment could affect the accumulations 1,000 feet inby, was difficult to follow. Tr. 416-18. He stated that a "hot area" on the belt would "increase" and "work its way all the way up to 25," causing an ignition that would, in turn, ignite "coal dust on the belt" and particles of coal on the belt, causing a fire in coal around the tailpiece that would spread throughout the "total belt entry." Tr. 416-18. Whether or not this scenario bears any relationship to reality, it is clear that he substantially misperceived the conditions at the #17.5 crosscut.[8] He testified that there was "blue smoke" coming from where the belt contacted the stand, and that: "The belt was on fire. It was burning." Tr. 71-72. His belief persisted, even though he admitted that he saw no flames, did not detect any carbon monoxide, the metal stand was warm rather than hot, and the belt was not burning when it was stopped by Duke. Tr. 116-17.

John Gallick, vice president of safety and health for Foundation Coal, of which Cumberland is an affiliate, testified that, from Radolec's description of the rubbing belt at crosscut #17.5, the belt was not on fire. He also testified, referencing earlier studies, that a belt cannot catch on fire by rubbing on a stand. Tr. 361-63, 440-43. Gallick has extensive education, training and experience in the field of safety, particularly as associated with fires,

[8] Radolec did not explain, e.g., how a hot area on the belt could ignite the accumulations when it was moving at approximately 500 feet per minute and was more than one foot away from them.

including belt fires.[9] He explained that, in the absence of dust or accumulations in contact with the point of friction, the fire resistant belt is the only thing that could potentially begin to burn, and that it cools as it leaves the point of contact and continues around the circuit, such that it cannot be ignited by rubbing on a stand. Tr. 362, 440-43.

Cumberland offered Gallick as an expert witness on mine fires and risk analysis. Tr. 317-18. The Secretary objected, contending that general opinions on whether a violation was S&S or the likelihood of an injury occurring and its severity are not proper subjects of expert opinion and, as a person who did not observe the conditions associated with the violation, he should not be permitted to offer lay opinion testimony. Tr. 324-26. The testimony was allowed, in essence provisionally, subject to later challenge, e.g., on grounds that it was unreliable or irrelevant.[10]

---

[9] Gallick has over 25 years of experience as a safety director for companies operating underground coal mines. While working for a safety consultant, he taught fire fighting and rescue teams at MSHA's training academy in Beckley, West Virginia, and has a Master's Degree in safety with an emphasis on management. He worked in command centers at two major mine fires, Marianna Mine 58 and the recent Aracoma fire. After his involvement in the Marianna belt fire, he became involved in research with consultants and with the then Bureau of Mines, National Institute for Occupational Safety and Health ("NIOSH"), on solutions to problems encountered at Marianna. He was involved in projects that generated research papers, which he did not author, many of which were cited and discussed in a recent MSHA report on belt fires from 1980 through 2005, referred to as the "Bentley Report." MSHA, *Reducing Belt Entry Fires in Underground Coal Mines* (2007). Ex. R-8. He also was an invited speaker by the chairman of a belt study group in 1989. Tr. 296-323.

[10] I declined to bar Gallick from testifying or to designate him as an "expert" in a specific field, and held that his testimony would be accorded whatever weight it was entitled to, based upon an evaluation of its relevance and reliability in light of his experience and qualifications. The parties were invited to make arguments on the relevance of his testimony in post-hearing briefs. Tr. 332-33. As I noted in *Cactus Canyon Quarries of Texas, Inc.*, 23 FMSHRC 280, 287 (Mar. 2001) (ALJ), the Commission, like most federal agencies, operates under far more liberal rules governing the admissibility of evidence than those set forth in the Federal Rules of Evidence. Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), provides that: "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." This is an entirely appropriate standard for litigation before the Commission's Administrative Law Judges. As one noted commentator has written:

> The complicated rules of evidence applicable to judicial trials were designed to govern decisionmaking by juries. They are premised on the belief that lay jurors are likely to misuse large categories of relevant evidence if they become aware of that evidence. Whether or not the [Federal Rules of Evidence] are well-suited to that purpose, they are totally inappropriate for application either to agency adjudications or to judge-tried cases. . . . .

Tr. 330-34. The Secretary argues, in her post-hearing brief, that Gallick's testimony on certain issues should be accorded little weight, because it is unreliable and contrary to established precedent. Sec'y Br. at 15-16. While some of Gallick's testimony should be accorded limited weight,[11] for the most part, his testimony was informative and well-supported.

I find Gallick's testimony regarding the probability of the belt catching fire because it was rubbing on the stand at crosscut #17.5, highly probative. The Secretary does not directly argue otherwise as to this part of his testimony. Gallick's statement that the fire-resistant belt could not catch on fire by rubbing on the stand was clearly explained, and was supported by references to studies. It also made sense. The belt was moving past the area of contact at approximately 500 feet per minute. A particular point on the edge of the belt came into contact with the stand, heated by the friction of the belt's rubbing, only for a fraction of a second. No significant amount of heat could transfer to the belt, because the stand was not particularly hot, and the length of time that any point on the edge of the belt was in contact with the stand was extremely short. That would be the case even if the stand became considerably hotter. Once passing the stand, a point on the belt edge made a complete loop of some 10,000 feet, before once again coming into contact with the stand. Any heat picked up by the edge of the belt would have been quickly dissipated as the belt moved through its circuit of travel.

Radolec agreed that the belt was not on fire when Duke stopped it, and he did not check to see whether it was hot. Tr. 116-17. The "warm" stand did not ignite the belt, even after it was stopped. As Gallick explained, while the belt cannot catch fire while moving, even from a hot roller, there is more potential for heating when the belt is shut down and a stationary portion of the belt is continuously exposed to a heat source. Tr. 362.

Clearly, the belt was not on fire, as Radolec believed, nor was there any realistic possibility that the belt could have caught on fire by rubbing against the belt stand. While the condition may have become somewhat worse as mining continued, there is no credible evidence that it would have been reasonably likely to cause an adverse effect, either directly or indirectly, on the accumulations cited, which were 1,000 feet away, and upstream in the 230 foot-per-minute ventilation flow.[12]

II Davis and Pierce, *Administrative Law Treatise* 118 (3rd ed.). Accordingly, there was no need to perform a "gatekeeper" function, as discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Rather, Gallick's testimony was allowed, subject to later challenge.

[11] For example, Gallick's testimony that the conditions were not S&S or hazardous has been accorded virtually no weight. Tr. 337-38.

[12] Radolec estimated, without any real foundation, that it had taken about one day for the belt to wear into the stand about one-quarter inch. Tr. 155-58. He also noted that belts are examined three times each day. Tr. 412. It is likely that a belt examiner would soon have

Radolec also believed that a belt roller, the bearings of which had failed, could become overheated by metal-to-metal contact, and ignite the belt and the coal on it. Gallick testified that studies had shown that a moving belt will not be ignited, even if coal is burning. Tr. 441-42. I find Radolec's belt ignition scenario entirely speculative and unfounded for the same reasons discussed above. Certainly, a bad roller in the area of the cited accumulations could present an ignition source. Gallick noted that the Bentley Report demonstrated that a bad roller could be a source of ignition, even though reportable fires from bad rollers were relatively rare. Tr. 361. However, the Secretary offered no evidence that there was a bad roller anywhere on the belt, and no evidence to establish that it was reasonably likely that a roller would fail in the area of the accumulations. Radolec walked the belt from the #11 crosscut to the #17.5 crosscut, where it was rubbing the stand and was shut down. He did not see any bad rollers. Tr. 425. Nor did he mention seeing any obviously bad rollers as he continued to walk the belt out to the tailpiece. While he may not have been able to detect a roller that was starting to fail while the belt was not running, a failed roller would have been very hot and most likely would have been identified even with the belt stopped. Cumberland's belt examiners were equipped with heat gun sensors to identify any rollers that might be hot. Tr. 227. Consequently, the possibility of a roller's bearing failing and creating a potential ignition source was significantly reduced. In addition, the accumulations were 18 to 24 inches away from the rollers.

Methane

The presence of methane can be a significant consideration in the S&S analysis, and Radolec relied on the fact that the Cumberland Mine produced over one million cubic feet of methane in a 24-hour period. However, there was very little methane in the area of the violation, nor was there likely to be. Radolec tested the atmosphere in the belt entry and found 0.4% methane, well below the explosive range. Tr. 82. The presence of methane in any significant concentration was unlikely because the belt entry was ventilated with a split of intake air that had not coursed through any other active workings. The Secretary argues that liberation of methane is unpredictable and that dangerous concentrations could occur at any time. However, it is well recognized that most methane is liberated when coal is being cut, i.e., at the active faces. *See, e.g., U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). In the Cumberland Mine, any methane liberated at the faces would be coursed out the return entry, not the belt entry. Moreover, the mine has virtually no history of methane ignitions.[13]

Equipment

The only equipment operating in the area was the belt system itself. The electrical cables, switches and boxes have been addressed above, as have the possibility of bad rollers and belt

---

discovered the condition and shut the belt down, as Duke did when he saw it.

[13] Cumberland had a major mine fire in 1987, a gob fire approximately three years earlier, and a recent electrical fire in a load center that was not reportable. Tr. 62, 131-32.

misalignments. Radolec believed that an injury was "highly likely to occur because of the nature of the very equipment that operates in a confined area." Tr. 408. Referring to the belt drive unit, he described "big motors with the enormous hydraulic equipment and the heat that they . . . put off." Tr. 409. It is apparent from that testimony, and from other explanations offered by Radolec, that he believes that conveyor belts, particularly newer belt systems that are substantially larger and more powerful than older systems, in themselves, pose a significant potential for catastrophic belts fires. He stated that his fire – methane explosion – dust explosion progression was not just a statement of possibilities, but "things that happen in the coal mines," and if something happens once it is highly likely to happen again. Tr. 131. He further opined that "[i]t's highly likely we are to encounter a coal mine fire any place in a coal mine, being that we are completely surrounded with the fuel of coal which is enhanced by methane." Tr. 131. If his statements are accurate, it was highly likely that a fire would occur in the belt entry at the #25 to #30 crosscuts, even after the accumulations had been completely removed and the area had been bulk rock dusted.

There are several problems with Radolec's catastrophic scenarios. First, the accumulations played virtually no role in his assessment that a belt entry engulfing fire was highly likely to occur and result in multiple fatalities. His testimony reflects his general assessment of dangers posed by modern belt systems, regardless of whether safety systems, such a CO monitors and fire suppression systems, are in place or whether unlawful accumulations are present. Second, his assessment is not supported by actual occurrences in the thousands of underground coal mines that have operated under MSHA's jurisdiction over the past 28 years. With one notable exception, there have been no fatalities and no reportable injuries resulting from any reportable belt fire since at least 1979.

The exception, of course, was the belt fire at Aracoma's Alma #1 Mine on January 19, 2006, in which two miners perished. It is apparent that the Aracoma fire figured heavily in Radolec's assessment of the dangers posed by conveyor belt systems. However, Gallick explained, and Radolec also admitted, that there were several conditions unique to the Aracoma mine that resulted in the disaster. The fire suppression system at Aracoma's belt drive unit, where the fire originated, had been turned off. Tr. 97, 127. Stoppings separating the escapeways from the belt entry were missing, such that the miners attempting to evacuate the mine were not protected from the products of combustion in the belt entry, and there were delays in the system for alerting miners to a fire and commencing evacuation from the mine.[14] In contrast, the belt drive unit at the Cumberland Mine, which was located about 5,000 feet from the accumulations, was protected by a substantial fire suppression system, including a "wall of water." Tr. 373. Permanent stoppings separated both escapeways from the belt entry, and there was an operational CO monitoring system that would provide an automatic early warning to the working sections,

[14] Aracoma's multiple flagrant violations of safety standards recently resulted in a negotiated settlement of criminal and civil enforcement actions, with Aracoma pleading guilty to several criminal violations and agreeing to pay criminal fines and civil penalties totaling 4.2 million dollars.

and prompt immediate evacuation of the mine. Tr. 351. Additional safety measures were also present as a result of recent legislation, including lifelines to assure that miners would not loose their way during an evacuation, like those who perished at Aracoma, additional self-rescuing devices to provide breathable air for a longer period of time, and additional training requirements for miners on escaping such hazards. Tr. 352-53, 378-79.

While the Aracoma fire demonstrates that a major belt fire can result in fatalities, the conditions under which it occurred bear no resemblance to the conditions at the Cumberland Mine. It has little significance on the question of whether the cited accumulations were S&S, and does not lend appreciable support to Radolec's determination that the accumulations were highly likely to result in a fatality.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Radolec certainly qualifies as an experienced MSHA inspector. He has been performing that function for fifteen years, and had 26 years of mining experience before becoming an inspector. However, aside from a general reference to his initial training, he did not relate his explanation of why he determined that the violation was S&S to his experience or training, nor did he cite any reports, studies or other information to support his determination. He was asked to explain the bases for his belief that the violation would be highly likely to result in fatalities, e.g., to cite personal experience, studies, reports, or other data, especially in light of MSHA's Bentley Report, which documented the fact that from 1980 to 2005 there were 63 reportable belt fires none of which resulted in a reportable injury, much less a fatality. Tr. 148-53, 415-20. His attempts to explain were largely non-responsive, and he felt that the Bentley Report actually enhanced his S&S finding. Tr. 95. He eventually made a general reference to his initial training as an inspector, some 15 years ago, and expressed his belief that the training had been based upon reported incidents. Tr. 426-28.

Severini, who also observed the accumulations, concurred with Radolec's determination on gravity. He has more limited experience as an MSHA inspector, having been an inspector for three years, and a supervisory inspector for one year. Tr. 166-67. He had over 25 years of previous mining experience, almost all of it as a manager. Tr. 167-69. Severini did not explain, in detail, why he agreed that the violation was S&S, or whether he believed that the catastrophic scenarios related by Radolec were reasonably likely to occur. When asked about ignition sources in the area of the accumulations, he identified only the "belt itself." Tr. 173. He later referred to the belt rubbing on the stand, but did not explain how that could have been an ignition source for the cited accumulations. Tr. 194. While he concurred with Radolec, his characterization of the violation and his assessment of whether other violations he had cited were S&S, suggest that he did not have a strong opinion that the violation was S&S.[15]

---

[15] Severini had issued a violation in a track entry at the Cumberland Mine for an accumulation of float coal dust over an extensive area, rating it non-S&S and unlikely to result in

My impression of his testimony on this issue is that he reluctantly supported Radolec because he did not want to, in essence, overrule him on a second violation. As previously noted, and as discussed below, Radolec had also issued a section 104(d)(1) order, citing an accumulations violation based upon trash he had observed at two locations along the track entry. Ex. G-8. Radolec had evaluated the violation as S&S, determined that it was "highly likely" to result in a "permanently disabling" injury, and that 10 persons were affected. The following day, Severini reviewed the order with Radolec. As a result of that meeting, Radolec amended the violation to delete the S&S designation and changed the gravity findings to "unlikely" to result in a "No Lost Workdays" injury, and that no persons were affected. Ex. G-8. While Severini and Radolec explained that the changes were mutually agreed upon, it was Severini's review that prompted the substantial amendments, and neither party cited any new information as a justification for the changes. Tr. 457-60; 507-08, 511-12.[16]

While it is possible that the fire/explosion sequence described by Radolec might or could occur, that is not sufficient to establish that it was reasonably likely that an injury producing event would occur as a result of the violation. Radolec's and, to a lesser extent, Severini's determinations that the violation was S&S are, by virtue of their positions, entitled to weight. However, their opinions were not based upon or explained in relation to their experience, or training, and they will be afforded weight only insofar as they are supported by the evidence.

Considering all of the *Enlow Fork* factors, I find that the violation was not S&S. The accumulations were not particularly extensive, only potential ignition sources were in the area, there was very little methane, and, aside from the remotely located belt rubbing the stand, there were no defects in the belt system. A significant factor is that the accumulations were not close to being in contact with the rollers or belt, and were not being added to. Here the focus is on the presence of an ignition source for these accumulations. While several possible ignition sources were identified, there was no evidence that any of them was reasonably likely to ignite the accumulations.[17] The potential ignition sources identified are present in all conveyor belt entries.

---

a lost workdays injury, and cited conditions that differed from those on October 4. Tr. 181, 190-91. He also had issued a violation for accumulations that were in contact with several rollers and were being ground up in the tailpiece, and rated it as S&S, and highly likely to result in a lost workdays injury. Tr. 185-86. He explained the difference between his evaluation of the latter violation and Radolec's evaluation of the instant violation as, being a judgment call and "everyone has to make that call themselves." Tr. 192.

[16] Radolec's initial evaluation of the violation was that the trash could propagate a fire and explosion originating in the belt entry, if it blew out a stopping between the belt and track entries. Tr. 458. Upon review, it was determined that that was not a "real reasonable case." Tr. 459.

[17] The presence of float coal dust, even though it had been deposited on limited rock dust, enhanced the possibility of an injury producing event occurring *if an ignition occurred*.

If they are sufficient to make an accumulations violation S&S, then virtually all accumulation violations in belt entries would be S&S. Clearly, that is not the case. I find that the violation was unlikely to result in a lost workdays injury, and that one person was affected.[18]

The finding that the violation was not S&S is consistent with other cases decided by the Commission and its Administrative Law Judges. *See Solid Energy Mining Co.*, 30 FMSHRC 823 (July 2008) (ALJ) (accumulations violation, consisting of dry textured float coal dust on mine floor, belt structure and water lines for distance of 642 feet, in mine that liberates in excess of 250,000 cubic feet of methane in a 24-hour period, held not S&S - there was no loose coal, the dust was paper thin, inspector's conclusion regarding dust's explosive nature was based only on the color of the dust, he acknowledged that he observed no ignition sources in the vicinity of the dust, and he found no methane in the area); *Jim Walter Resources, Inc.*, 30 FMSHRC 834 (July 2008) (ALJ) (accumulations violation consisting of float coal dust, black in color, on top of rock dust, on roof, ribs, belt frame and floor extending 867 feet, with coal fines in layers of rock dust for 1,451 feet, up to 48 inches deep, potential ignitions sources consisted of electrical cables and possibility of belt roller going bad, but no evidence of the likelihood of an ignition by the electrical equipment or likelihood that a roller would go bad in a manner to cause an ignition, and no defects were found in electrical equipment or rollers); *Amax Coal Co.*, 19 FMSHRC 846 (May 1997) (S&S finding affirmed where accumulations were 6 inches to 3 feet deep for 85 along belt and 200 feet along intersecting belt, accumulations were covered with float coal dust and an ignition source was present where the belt was running for 15 feet on dry, packed coal and loose coal); *Clinchfield Coal Co.*, 21 FMSHRC 231, 238-42 (Feb. 1999) (ALJ) (accumulations 2 to 24 inches deep extending 3,000 feet, float coal dust extending 450 feet, ignition sources presented by 37 places where rollers were running in the accumulations or were stuck and 11 places where rollers were missing and the belt was rubbing on the stand); *Maple Creek Mining, Inc.*, 22 FMSHRC 742, 754-56 (June 2000) (ALJ) (accumulations 4 feet by 4 feet and 1 foot deep and ignition source presented by tail roller running in accumulations and belt rubbing on stand in close proximity to accumulations, and stand was too hot to touch).

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

Radolec posited that the dust and fines would ignite, eventually resulting in a methane explosion that would put the dust into suspension producing a dust explosion. Tr. 82-84. Gallick opined that a dust explosion would almost always require a methane explosion to put the dust into suspension, and that it would need to be very thick in the air to be explosive itself. Tr. 369-70.

[18] The Secretary argues that several other violations issued by Radolec, which were not at issue in these cases, support the S&S finding. Tr. 86, 120-24. For the reasons cited by Gallick, I find that they are largely irrelevant on the S&S issue. Tr. 369, 394.

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violation was the result of an unwarrantable failure because the conditions were extensive, obvious, posed a high degree of danger, and existed for several days. Moreover, management was on notice of the conditions, because they had been repeatedly noted in reports of preshift examinations, and numerous prior violations had put Cumberland on notice that additional efforts were needed to address accumulations hazards. Not surprisingly, Cumberland disagrees with each of these arguments.[19]

---

[19] The Citation was issued pursuant to section 104(d)(1) of the Act, which requires that a violation be both S&S and the result of an unwarrantable failure. Because the violation has been held not to have been S&S, it is technically unnecessary to decide the unwarrantable failure issue. However, it is necessary to address the issue of Cumberland's negligence, which is alleged to

As noted in the discussion of S&S, the accumulations were fairly extensive and, while they were only about one-half inch deep in the traveled areas of the entry, they should have been reasonably obvious to preshift examiners. The Secretary argues that, because the violation was highly likely to result in fatalities and was S&S, that it posed a high degree of danger. However, the violation was found not to have been S&S. Rather it was unlikely to result in an injury resulting in lost work days. The accumulations were not being added to. Some rock dust had been applied, and they were damp or wet in areas, particularly close to the feeder.[20] Tr. 49. The belt rubbing on the stand at the #17.5 crosscut did not pose a realistic possibility of an ignition of the accumulations, and there were no other ignition sources identified that presented a reasonable likelihood that an ignition would occur. Consequently, while the accumulations constituted a hazard, they did not pose a high degree of danger.

The Secretary places great emphasis on the fact that Cumberland's preshift reports for several days prior to the violation showed that the area in question needed rock dusting, and argues that Cumberland had ample knowledge of the conditions. As Radolec explained, his review of the operator's preshift reports showed entries dating back to September 22, 2007, stating that areas of the belt entry from various crosscuts to the tail piece "needs dusted." Tr. 66-67, 138; ex. G-5. The preshift reports are signed by the Assistant Foreman, the Mine Foreman and the Superintendent. Ex. G-5. Radolec and Severini determined, based on those notations, that Cumberland's higher level managers had actual knowledge of the violation for several days, and took no action to abate the condition. Tr. 89-90, 178-79.

Cumberland takes issue with the Secretary's argument. It points out that the "needs dusted" notations were made in a section of the report titled "Violations Observed and Reported; Violation or Condition." Immediately below that is another section of the report, entitled "Dangerous and Hazardous Conditions Observed and Reported." The word "none" was entered in the hazardous conditions section of the reports. Konosky testified that there was a very significant difference between the two sections of the report. Any dangerous or hazardous conditions would be reported in that section and would be immediately attended to, as required by the Secretary's regulations. He also related that mine managers reviewing the reports would pay particular attention to hazardous conditions and assure that they were addressed, whereas conditions noted in the "violation or condition" section, would be addressed in due course.

---

have been high. Other citations and orders are also at issue, and the S&S finding may not become final. For the sake of judicial economy the issue of unwarrantable failure, as well as negligence, will be addressed.

[20] There was conflicting testimony on whether the accumulations were wet or dry. Radolec, Severini and Lemenovich testified that they were dry. Tr. 79, 175, 202. Konosky, Nairn and Perry testified that they were wet. Tr. 223, 240, 286. Duke testified that they were generally dry, but may have been wet or damp near the feeder. Tr. 49. It is well settled that wet or damp accumulations can dry out and ignite, and do not establish that a violation is not S&S. *See Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990).

Tr. 228-30. John Nairn, Cumberland's continuous miner manager, had over thirty years of mining experience, and also testified that there was a difference in the types of conditions that would be reported in the two sections of the preshift report. Hazardous conditions would be noted in that section, and would be immediately attended to, i.e., either corrected or the area dangered off. Other conditions reported in the first section would be looked at and dealt with in the regular course of business. Tr. 254-55. Based on this testimony, and the nature of the reports themselves, Cumberland argues that the "needs dusted" entries were merely routine notations that bulk rock dusting had yet to occur in relation to the most recent belt move, and did not indicate that a hazardous condition existed. Radolec and Severini were of the opinion that, in their experience, there was no difference between the two sections of the report, and that any entries were regarded as notifications of hazardous conditions. Tr. 100, 179-80.

As the section advanced, the feeder and belt tailpiece were periodically moved further inby, extending the belt. Belt moves were done about twice a week. Tr. 242. Cumberland's standard procedure was to clean up loose coal with a scoop from the tailpiece to the next crosscut inby, where the feeder was going to be moved. Loose coal around the feeder would be shoveled onto the belt. The area then would be fling dusted, using a mechanical duster mounted on a scoop, and the feeder and tailpiece would be moved inby one crosscut. The construction department would be notified and bulk rock dusting would be done after the move. Tr. 242-45. Cumberland argues that the entries, "needs dusted," merely are reports that the bulk dusting had not yet occurred. A comparison of the preshift reports with reports of bulk rock dusting introduced by Cumberland lends some credence to Cumberland's explanation. The miner crews that perform bulk rock dusting submit a report, identifying where rock dust was applied, and how much of it was dispensed. Tr. 245-50; ex. R-3. Preshift reports for September 22, 23 and 24, indicate that the 8 Butt belt entry from crosscut #17 to the tailpiece needed dusting. Ex. G-5 at 22-27. A rock dust report for September 24 indicates that bulk dusting was done that day from crosscut #17 to crosscut #19. Ex. R-3. A later preshift report for September 24, and subsequent reports, reflect that fact, because the #17 to #19 area is no longer identified as needing rock dust. Ex. G-5 at 29-33. Preshift reports for September 24 through 27 show the area from crosscut #19 to the tailpiece needing dust. A rock dust report for September 27, indicates that dusting was done from crosscuts #19 to #22. Preshift reports thereafter indicate that that area no longer needed dusting. Likewise, a rock dust report for October 2 indicates that the area from crosscuts #23 to #25 was dusted, and preshift reports thereafter indicate that the area from crosscut #25 outby no longer needed dusting.[21] Curiously, preshift reports from September 25 through October 4 state that the area between crosscuts #11 and #16 needed dusting, and there are no rock dust reports showing that that occurred. On his October 4 inspection, Radolec walked the area from crosscut #11 inby and found no hazardous conditions. Tr. 69, 93.

---

[21] The reports are not entirely consistent. A rock dust report for October 3 states that bulk dusting was done in the belt entry between crosscuts #24 and #27. Ex. R-3. However, preshift reports 9:00 p.m. on October 3 and 5:00 a.m. on October 4 continue to show a need for bulk dusting from crosscut #25 inby. Ex. G-5 at 84, 87.

Preshift examiners are required to "examine for hazardous conditions," make a record of any hazardous condition found, and either immediately correct it or post the area with a conspicuous danger sign. 30 C.F.R. §§ 75.360(b), (f), 75.363. Cumberland's records of preshift examinations reported that no "Dangerous and Hazardous Conditions" were found during the examinations. Those conducting the examinations and reporting the results, noted conditions in the "violation or condition" section of the report that they did not consider hazardous, and mine managers reviewing the reports did not consider them to be reports of hazardous conditions. Neither preshift examiners, nor higher level managers, took steps to immediately correct such conditions, or to bar miners from entering the areas until the conditions were corrected. They obviously did not consider them to be hazardous conditions that required such attention.

The notations that portions of the belt entry needed rock dusting, and that the condition had been reported, do not, on their face, indicate the existence of a hazardous condition. A manager, reviewing the reports in sequence, would have seen a need for the application of bulk rock dust, that the condition had been reported, and that bulk rock dust application was progressing in the entry. The area reported as needing dusting progressed from #17 crosscut on September 22, to the #22 crosscut on September 27, to the #25 crosscut on October 2.

I find that, while the preshift reports put higher level mine managers on notice that bulk rock dusting was yet to occur, they did not notify them that any hazardous condition existed, or that the cited accumulations existed. Cumberland is, nevertheless, chargeable with knowledge of the accumulations, because preshift examiners act as agents of the operator when conducting such examinations. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991); *Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979). From September 30 through October 3, eight different preshift examiners noted that the conditions in the belt entry from crosscut #25 inby needed to be bulk rock dusted. Ex. G-5 at 63-84. They obviously did not regard the conditions as hazardous, and needing immediate attention. While the preshift examiners are chargeable, as agents of Cumberland, with knowledge of the accumulations, higher level managers had no such knowledge.

The Secretary argues that Cumberland was put on notice that increased efforts to address accumulations were needed because it was cited 63 times in the prior two-year period for violations of section 75.400. Radolec took that into account in determining to cite the violation as an unwarrantable failure. Tr. 93, 140-41. However, he acknowledged that the standard applies to a wide variety of situations, and is the most cited standard in the nation. Tr. 140-41. While Severini agreed with Radolec's assessment of negligence, he did not find the fact that Cumberland had been cited for 63 violations of section 75.400 to be of significance. It did not affect his assessment of whether the violation was the result of an unwarrantable failure, because section 75.400 covers a broad range of conditions, such that 63 violations was "just not a true number to this situation." Tr. 177-78. I agree with Cumberland's argument that to establish that it had been put on notice that additional compliance efforts were needed, the Secretary was required to show more than a history of prior citations for violations of the broad standard, and find that Cumberland had not been put on notice that additional compliance efforts were needed.

Considering all of these factors, I find that the violation was not the result of Cumberland's unwarrantable failure, and that its negligence was moderate to high. The fact that eight different preshift examiners, including Nairn, did not regard the conditions as hazardous reflects more an honest disagreement over whether a hazardous violation existed than aggravated conduct constituting more than ordinary negligence.

Order No. 7025469

Order No. 7025469, which was issued in conjunction with Citation No. 7025468, alleges a violation of 30 C.F.R. § 75.363(a), which requires that hazardous conditions found during preshift examinations be corrected immediately or be posted with a conspicuous danger sign and remain so posted until the hazardous condition is corrected. The alleged violation was described in the Condition and Practice section of the Order as follows:

> The mine operator failed to correct immediately a hazardous condition reported in the pre shift examination book. The hazardous condition recorded stated the condition 8 Butt conveyor belt needed rock dusted from No. 25 to 30. This hazardous condition was first recorded in the pre shift record book on the surface on 9/25/2007, 8:00 P.M. to 8:40 P.M. and [continued] to be recorded with out any corrective action being taken to correct the condition including this days pre shift examination 10/04/2007 day shift. An inspection of this hazardous condition was conducted this day and as a result of this days inspection, Citation No. 7025468 was issued for a violation of 75.400 (accumulations of combustible materials existing). Also during the time the inspection was being conducted no miners were observed working to correct the hazardous condition recorded in the pre shift record book. This type of violation has been issued 0 times during the last 2 years at this mine.

Ex. G-6.

Radolec determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that 13 persons were affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard.

As noted in the discussion of Citation No. 7025468, I found that notations in the preshift reports that areas of the belt entry needed rock dusting did not report a hazardous condition that required immediate correction under the preshift regulations. However, I did find that the accumulations violated section 75.400. While the violation was not S&S, the accumulations presented a measure of danger to safety, and should have been specifically identified and reported as such by the preshift examiners. As Radolec stated, to be properly reported in the preshift report, the specific conditions, as noted by him, should have been reported. Tr. 99, 161.

Consequently, the regulation was violated.

For the same reasons that I found the accumulations violation was not S&S, I find that this violation was not S&S, but was unlikely to result in a lost workdays injury to one miner. Likewise, I find that it was not the result of Cumberland's unwarrantable failure and that Cumberland's negligence was moderate to high.

Order No. 7025481

Order No. 7025481, which was issued on October 11, 2007, pursuant to section 104(b) of the Act, alleges that Cumberland failed to timely abate the accumulations violation that was the subject of Citation No. 7025468. Radolec's rational for issuing the Order was described in the Condition and Practice section as follows:

> No effort was made to remove accumulations of dry black coal fines in the conveyor belt entry of the 8 Butt 027-0 (M.M.U.) number one entry between number 29 and 30 cross cut, after an extension of time had been granted from the initial citation termination time. An extension of time was granted on 10/09/2007, 12:45 P.M. for the condition to be corrected by 2:45 P.M. Upon inspection of the area on 10/11/2007 10:30 [A].M. the accumulation of coal fines still existed at the same location and no miners were at work to correct the condition when inspected. This type of violation has been cited 65 times at this mine during the past two years.

Ex. G-10.

Section 104(b) of the Act provides:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b).

The Secretary contends that, in the area between the #29 and #30 crosscuts, the original accumulations cited on October 4 had not been cleaned up adequately, were present on October 9

when additional time for abatement was granted, and remained in their original condition on October 11 when Radolec issued the section 104(b) order. Cumberland argues that the original accumulations in that area had been cleaned up and that any accumulations present on October 11 were most likely deposited on October 10, such that issuance of the order was an abuse of discretion.

In order to present a prima facie case that a section 104(b) withdrawal order was properly issued, the Secretary must prove that the originally cited condition continued to exist after the period allowed for abatement expired. *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (Apr. 1989). The operator may rebut the Secretary's prima facie case by showing that the conditions in the citation had been abated within the period allowed, but that they recurred. The operator may also challenge the reasonableness of the time period set for abatement, or the Secretary's refusal the extend the period. *Energy West Mining Co.*, 18 FMSHRC 565, 568 (Apr. 1996). The burden is on the operator "to bring to MSHA's attention any specific abatement measures justifying extension of the abatement period." *Energy West Mining Co. v. FMSHRC*, 111 F.3d 900, 904 (D.C. Cir. 1997). In evaluating whether an inspector has abused his discretion in issuing a section 104(b) withdrawal order, in lieu of extending the abatement period, the following factors should be considered: 1) the degree of danger that extension would have caused to miners; 2) the diligence of the operator in attempting to meet the date originally set for abatement; and, 3) the disruptive effect that an extension of time, or a failure to extend the time, would have had upon operating shifts. *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330, 339 (Mar. 1986).

The underlying citation was issued on October 4, 2007, at 8:40 a.m., and identified in detail the affected areas. The originally specified abatement deadline was 12:00 noon, on October 4. However, because Radolec did not return to the mine until October 9, the abatement time was, in effect, extended from three hours and 20 minutes to five days, including a weekend and a holiday. On October 4, when the citation was issued a crew of eight to ten miners began to clean up the accumulations. They were told by Konosky to clean from rib to rib, and worked for about an hour until the inspection party left, and continued to work thereafter. Preshift reports for October 4 examinations noted that the area was being worked on. The 9:00 p.m. report showed that the area from #25 to #29.5 had been "corrected," and that the area from #29.5 to the tailpiece at #30.5 had been "reported." Ex. G-5 at 92. The report of the 5:00 a.m. examination on October 5 noted that the #29.5 to tailpiece conditions had been "corrected," and subsequent reports noted no conditions in the area. Ex. G-5 at 93. Rock dust reports purport to show that bulk dusting was done on October 4 from crosscut #25.5 to the tailpiece. Ex. R-3.

When Radolec examined the area on October 9, he was satisfied that about 75% of the cleanup had been done and the area had been well dusted. However, he believed that the area between crosscuts #29 and #30 had not been cleaned. He spoke to Fred Evans, a Cumberland safety representative, about the failure to clean, and gave Cumberland another two hours, until 2:45 p.m. to complete the abatement. Ex. G-4. Evans believed that the area was clean, under any realistic standard, noting that "you would have had to scrape it to get it any cleaner."

Tr. 267. He explained that the continuous miner's round cutting head left indentations in the mine floor that a scoop could not completely clean. Tr. 271. In his opinion, the only difference between the areas #29 to #30 and #25 to #29 was that the latter had been heavily rock dusted. Tr. 274. He got two miners to scrape and clean the area. Radolec gave the men a safety talk and, with Evans, marked where cleaning needed to be done with red tape. Evans checked with the shift foreman later, and was told the cleanup had been completed. He also told the afternoon shift foreman to check on the area, and was advised the next day that it "looked alright." Tr. 269. Preshift reports for October 9 show that the area from crosscut #29 to the tailpiece needed dusting, and by 9:00 p.m. had been "corrected."

When Radolec returned on October 11 he observed what he believed to be the same conditions he had observed two days earlier, and concluded that no more work had been done after he left. At 10:30 a.m., he issued the section 104(b) order, which effectively shut down the belt and ceased production on that section. He wanted the fines removed and the area blanket dusted. At noon he was advised that the work had been done and that the order should be lifted. However, he required that more rock dust be applied, and eventually terminated the order at 1:20 p.m. Five miners had worked on the cleanup effort, and others carried 40 pound rock dust bags to the area.

Walter Lemenovich, an MSHA trainee inspector, accompanied Radolec on October 11, and confirmed the existence of dry accumulations of coal fines under the belt ranging from zero to four inches deep. Radolec told him, upon seeing the conditions, "this is where they stopped cleaning." Tr. 203. Lemenovich overheard miners in the "dinner hole" questioning why they were shoveling, apparently suggesting that they did not feel that whatever loose coal was there needed to be removed. Tr. 205. Perry, who was with Radolec on the 11th, thought that the area from #25 to #30 looked "pretty nice." Tr. 286. He could see shovel marks in the #29 to #30 area, and small irregularly spaced piles of wet fines 18 to 24 inches in diameter and 0 to 2 inches deep, for about 80 feet. Tr. 287-89. Radolec kicked at the piles, and inquired "what's this?" To which Perry responded I think it's pretty good. According to Perry, Radolec then whirled and showed him a 104(b) order. Tr. 288.

Cumberland's first argument is that its documented abatement efforts prove that the conditions were completely abated, and that any coal fines present on the 11th could not have been the same material that was cited on the 4th or was there on the 9th. It notes that a preshift report for October 10 shows spillage at the tailpiece. However, that report also shows that the condition had been "corrected," and no one suggested to Radolec that the material that was under the belt on the 11th between crosscuts #29 and #30 was the result of spillage that occurred on the 10th at the tailpiece which was located at crosscut #30.5. As noted above, Radolec testified, under questioning by Cumberland's counsel, that no additional material had been deposited between the 4th and the 9th, i.e., there was no ongoing spillage in the area, and that it was a "pretty good belt." Tr. 133. I find that there were irregularly spaced "piles" of coal fines and loose coal, approximately 24 inches in diameter, ranging from zero to two to four inches deep, located under the belt from the #29 to the #30 crosscut, and that it was part of the accumulations

that had been cited on October 4. Cumberland's argument that the material was newly deposited is not supported by the evidence.

In deciding to issue the section 104(b) order, Radolec necessarily decided that no additional time should be allowed to abate the condition. It is appropriate, therefore, to assess whether he acted reasonably, or arbitrarily, by analyzing the factors identified in *Youghiogheny.* A further extension of time, e.g., two more hours, would have allowed the limited accumulations to remain in a decreasing amount over another one-to-two-hour period.[22] I have held, in relation to the October 4 citation, that the entirety of the accumulations on October 4 did not present a high degree of danger to miners. While Radolec determined that the violation was S&S, he did not consider issuing an imminent danger order pursuant to section 107(a) of the Act. By October 9, at least 75% of the area had been cleaned and heavily dusted, and some rock dust had been deposited in the #29 to #30 area. While there were some irregular piles of coal fines present, the measure of danger to miners by allowing additional abatement time, e.g., four hours, would have been minimal.

Cumberland had been reasonably diligent in abating the violation, at least up to a point. Substantial effort was expended on October 4, when the violation was cited. Preshift and rock dust reports confirm efforts to correct the cited conditions. Additional efforts were expended on October 9, when Radolec determined that the condition had not been completely abated. Radolec was convinced that the two miners who were shoveling on the 9th stopped when he left the area and that no further work was done. Completion of the abatement effort on October 11 consumed about three hours of work by a crew of five miners, plus rock dust carriers. About half of that time was devoted to cleaning up the accumulations. As noted above, I find that Cumberland exhibited diligence in abating the violation, but that it could have been more diligent by assuring that the miners who started cleaning on the 9th completed the job.

Issuance of section 104(b) order is a very powerful tool in the Secretary's enforcement arsenal. An inspector can force stoppage of production, without prior notice and opportunity for a hearing, and substantial disruption of mining operations can occur. Shutting down the belt caused disruption of that regular production shift. However, it may not have been as disruptive as if it had happened at a different time. Lemenovich testified that Cumberland normally shut down for a half day on Thursdays (October 11, 2007, was a Thursday). No witness contradicted that testimony. The 104(b) order was issued at 10:30 a.m. While it was not terminated until 1:20 p.m., its actual impact may have been limited to a shorter period.

Whether Radolec abused his discretion by issuing the withdrawal order is a very close question. There is evidence that he may have been unreasonable in insisting on excessive

---

[22] From the evidence regarding the abatement effort, it appears that the fines would have been cleaned up in approximately four hours, considering that a smaller crew would have been available. Distribution of rock dust would have had to occur after the cleanup.

abatement measures.[23] The measure of danger to miners that would have attended another brief extension of the abatement period would have been small, and the disruption caused by issuing the order was significant. Had he issued it on October 9, when he first observed that accumulations remained in the area, it is doubtful that the order could have been sustained. However, he did not do so. Rather, he explained in some detail what he believed to be necessary abatement actions, and marked specific areas in question with red tape to assure that there was no misunderstanding about what needed to be done. Two days later, the area had still not been cleaned and dusted to his satisfaction. Bohach protested that issuing the order was "very strong" enforcement action and that the problem may have been the result of miscommunication. Tr. 435. The order certainly was strong enforcement action, but the conditions that lead to its issuance were not the result of miscommunication.

Upon consideration of all the evidence, I find that Radolec did not abuse his discretion in issuing the section 104(b) withdrawal order.[24] I am troubled by the fact that, in deciding to issue the order, he apparently did not specifically weigh the three factors identified in *Youghiogheny*. However, on balance, the lack of diligence that he perceived following his specific instructions on October 9, coupled with the small measure of danger to miners that would have been posed by briefly extending the abatement time, outweighed the disruption caused by issuance of the order.

Order No. 7025480

Order No. 7025480 was issued on October 11, 2007, and alleges a violation of 30 C.F.R. § 75.400, which was described in the "Condition and Practice" section of the Order as follows:

> An accumulation of combustible material consisting of wooden pallets, plastic 1 gallon containers, open empty 5 gallon oil cans, card board boxes, ventilation cloth, brown paper bags, resin glue boxes, 3 sheets of card board and 6 crushed 5 gallon oil cans existed at number 10 cross-cut. Also an accumulation of combustibility material consisting of a large garbage bag full of 8 open empty 5 gal hydraulic oil cans and plastic 5 gallon containers existed in the cross-cut of number 20 cross-cut. This condition exist along the active coal producing 8 Butt 027-0 (M.M.U.) intake escapeway ventilation air course and track haulage. This condition was reported in the pre-shift record book on the surface dated 10/06/2007 08:00 P.M. to 09:25 P.M. at number 10 cross-cut and then on

---

[23] As noted above, Duke thought that some unnecessary shoveling of rib sloughage had been required on October 4. In addition, several Cumberland managers, including Evans, who had retired by the time he testified, were of the opinion that the area was clean under any reasonable definition of the term.

[24] Cumberland argues that section 104(b) orders cannot be issued for failures to abate citations issued pursuant to section 104(d) of the Act. I reject that argument, as one other ALJ has. *Pretzel Excavating*, 12 FMSHRC 1308, 1317-18 (June 1990) (ALJ).

> 10/09/2007, 12:35 P.M. to 01:35 P.M. report of garbage at number 20 cross-cut along with the garbage at number 10 cross-cut and continued including in the pre-shift record book for this dayshift, 10/11/2007. This type of violation has been cited 64 times at this mine in the past two years. Also this is a mine that liberates methane in excess of 1 million Cu. Feet of methane gas in a 24 hour period and is on a M.S.H.A. 5 day spot inspect schedule.

Ex. G-8.

As issued, the Order alleged that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that 10 persons were affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. However, when Severini reviewed the Order with Radolec on October 12, 2007, it was modified to allege that it was unlikely that the violation would result in an injury, that the violation was not S&S, and that no persons were affected. The reasons for the modification of the Order were stated as:

> After farther review and evaluation by the issuing coal mine inspector. Of all the facts surrounding. For this type of accumulation of combustible material and there location. To add into a acceleration of a coal dust or methane gas explosion. It has been determined that this type and amount of combustible materials and location of these materials. That they would not be a farther enhancement to a coal dust or methane gas explosion propagation. This determination has been evaluated for this particular condition, location and time. This order is being modified to reduce the gravity of the subject order. (no corrections made)

Ex. G-8.

The Violation

There is no dispute that the materials cited as trash were present, as Radolec described them, at the #10 and #20 crosscuts, in the track entry. Perry agreed that the materials were at those locations. Tr. 517. Radolec noted in the Order that the trash at crosscut #10 had been noted on preshift reports since October 6, and that the trash at crosscut #20 had been noted since October 9. Ex. G-8. At the hearing he testified that the conditions had been reported since September 28. Tr. 463. He was mistaken. While the preshift reports show that trash had been noted in the haulage entry at crosscuts #10 and #20 from September 28 to October 1, the condition was noted as "corrected" on October 1, and there are no reports of trash at either location until 9:00 p.m. on October 5, when trash was noted at crosscut #10. Ex. G-5 at 62-70, 97. Trash was not noted at crosscut #20 until October 9. Ex. G-5 at 13.

The Secretary's regulations require that mine operators establish a program for regular cleanup and removal of combustible materials. 30 C.F.R. § 75.400-2. The provisions of the program are not subject to MSHA approval, and thus are largely within the mine operator's discretion. Cumberland's cleanup program provided that trash was to be hauled to the section supply point "as necessary to facilitate its removal from the mine." Ex. G-9. Nairn explained that active mining generates a great deal of trash, as is evident from the descriptions of the cited trash deposits. Tr. 533-34. Removal of trash is an ongoing process, and is done on a shift-by-shift basis. Tr. 532. Typically, it is done on the midnight shift, when supplies are delivered to the section. An empty supply car, or garbage car, would be loaded with trash and taken out of the mine. Tr. 529-30. There is no set schedule for trash removal. Tr. 463, 521. It might occur during the same shift it was deposited, or could take several shifts if an empty car on which to load the trash was not available. Tr. 533-34. The section's trash was accumulated at crosscut #20, a designated location, and was placed in a large plastic bag hung on the rib. Tr. 513-14. Unbeknownst to Radolec, Cumberland also had an outby work site where a de-gas hole was being drilled. Tr. 467, 515. Crosscut #10, at the track entry, was the designated location for the temporary deposit of trash generated by that operation. Tr. 515, 527-31. Crosscuts #10 and #20 were designated areas for the accumulation and removal of trash under Cumberland's cleanup program, and the preshift reports show periodic notations of trash at those locations. Radolec placed considerable significance on the fact that the trash was not at crosscut #25, which he believed was the section supply point. Tr. 484. However, whether the #20 and #10 crosscuts were "section supply points," is not material to whether a violation was committed. As Radolec explained in response another question, you have to apply common sense to an evaluation of the process, and it appears that designating those points as trash collection locations was not a deviation from the cleanup program. Tr. 491-92.

As observed in other reported decisions, the standard does not require that trash be removed from a mine immediately. *See, e.g., Basin Res. Inc.*, 19 FMSHRC 711, 717-18 (Apr. 1997) (ALJ). However, if a significant accumulation of combustible trash is allowed to remain in the mine for an unreasonable period of time, section 75.400 may be violated. *Basin Res. Inc.*, 19 FMSHRC 1391, 1403 (Aug. 1997) (ALJ). As described by Cumberland's witnesses, while there was no set schedule for removal of trash, it typically would have been removed within 24 hours. Tr. 533-34. As Perry stated, it generally doesn't sit for days, and if it has not been removed in a week, someone is not doing his job. Tr. 521.

I place little significance in the fact that there was trash at crosscut #20. That was a designated trash accumulation site for the section, and had been cleaned on October 1. No notations of the existence of trash at that location appear in the preshift reports until October 9, less than two full days before the issuance of the Order.[25] While its presence for that length of time is of concern, the fact that the trash was collected in a large bag which was practically full,

[25] Severini observed trash at the #20 crosscut on October 4, and discussed its presence with Cumberland personnel. The condition was not cited as a violation, and there is no evidence that the trash, which was at the section's trash collection site, remained there until October 11.

and was located at a designated point for removal appears to be consistent with the established cleanup program. The trash at crosscut #10, however, is a different matter. That trash was associated with the outby de-gas operation. It made sense to designate crosscut #10 as a place to accumulate the trash, rather than haul it inby to crosscut #20. However, it was a significant accumulation of largely combustible material and, judging from the preshift reports, had been allowed to remain in place since October 5, about 6 days. I find that Cumberland allowed a significant accumulation of combustible material to remain at the #10 crosscut in the track entry for several days. The trash was allowed to accumulate and was not cleaned up, in violation of section 75.400.

Cumberland makes several arguments challenging the violation. At least two do not require extended discussion. It argues that trash is not a hazard intended to be prevented by section 75.400, because it was not likely to cause a fire. Cont. Br. at 63-64. However, as noted in *Utah Power & Light Co.*, 12 FMSHRC 965 (May 1990), the case cited by Cumberland for the proposition, the standard addresses accumulations of combustible materials that can cause a fire "*if an ignition source is present*." 12 FMSHRC at 968 (emphasis added). Certainly, the paper bags, wooden pallets, cardboard and plastic items could readily catch fire in the presence of an ignition source. Cumberland also contends that no reasonable person could anticipate that accumulations of trash that remain in a mine for several days could amount to a violation of the standard. However, the Commission has sustained violations of section 75.400 based upon accumulations of trash, and Cumberland itself has been cited for such violations in the past. *Jim Walter Res. Inc.*, 18 FMSHRC 508, 509-10 (Apr. 1996); Tr. 518.

Cumberland argues that there is no evidence to establish that the trash present on October 11 had been there six days earlier or at any point in the past. However, while I agree that Radolec's reference to September 28 was an erroneous reading of the preshift reports, those reports indicate the presence of trash accumulations at the #10 from October 5 to October 11. While the Secretary's witnesses did not personally observe the trash at those earlier times, and could not testify that it was, in fact, the same trash, it is reasonable to infer from the continuous reports of trash at that location, that a large portion of the trash observed on October 11 had been there since October 5.

Unwarrantable Failure

The violation, as modified, was not S&S, and was determined to be unlikely to result in an injury, involving "No Lost Workdays." Ex. G-8. At the hearing, Radolec and Severini retrenched a little on their evaluation of gravity, stating that one miner was affected, rather than none, and describing a potential injury as smoke inhalation or burns. Tr. 460, 486, 509. Nevertheless, I find that the violation presented a low degree of danger to miners.[26] The trash

[26] Radolec cited the fact that the mine is "gassy," and is subject to 5-day spot inspections. He did not note that he tested the atmosphere in the track entry and found no methane. Tr. 470. Without more, I find the fact that the mine was gassy does not enhance the

accumulation at crosscut #10 was significant, occupying an area approximately 8 feet by 35 feet, as of October 11. It most likely was not that large on October 5, because it would have been added-to until the 11th. It was bagged or stacked at the trash loadout point for the de-gas project. Tr. 514-15, 528. I find that the condition was not extensive. It existed for six days, and mine management was on notice that the trash needed to be picked up and transported out of the mine. Cumberland appears to have been following its cleanup program. However, the intervals between trash pick-ups, particularly at the #10 outby work site, had been allowed to grow too long. As with the initial accumulations violation, Radolec placed great significance on the noting of the conditions in the preshift reports, believing that they had been identified as hazards to upper level management. Tr. 463-65, 467. However, as pointed out in the discussion of the initial citation, the notations were not in the "hazards" section of the reports, and Cumberland's examiners noted non-hazardous conditions in the reports.[27] Radolec also noted the fact that Cumberland had been cited 64 times for accumulations violations in the last two years. However, for the reasons expressed by Severini with respect to the coal accumulations citation, I find that fact insufficient to put Cumberland on notice that greater efforts were needed to address accumulations of trash.

On the whole, considering all of the factors addressed above. I find that the violation was not the result of Cumberland's unwarrantable failure, but that its negligence was moderate.

ORDER

Order No. 7025481 is **AFFIRMED**, and Citation No. 7025468, Order No. 7025469 and Order No. 7025480 are modified to citations issued pursuant to section 104(a) of the Act, and are **AFFIRMED, as modified**.

Michael E. Zielinski
Administrative Law Judge

---

danger to miners of this violation.

[27] Nairn testified that he would not note the presence of trash at a loadout point on a preshift report, except to pass information on to a supervisor of an area he was not responsible for. Tr. 536-39.

Distribution:

Donald K. Neely, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222